

# Validation and virtuosity: perspectives on difference and authorship/control in dance

Whatley, S. , Waelde, C. , Brown, A. and Harmon, S. (2015) Validation and virtuosity: perspectives on difference and authorship/control in dance. *Choreographic Practices*, volume 6 (1): 59–83.  
[http://dx.doi.org/10.1386/chor.6.1.59\\_1](http://dx.doi.org/10.1386/chor.6.1.59_1)

Publisher: Intellect

This is an Accepted Manuscript of an article published by Intellect in *Choreographic Practices*, 04/12/2014, available online  
<http://www.ingentaconnect.com/content/intellect/chor/2015/00000006/00000001/art00005>

Copyright © and Moral Rights are retained by the author(s) and/ or other copyright owners. A copy can be downloaded for personal non-commercial research or study, without prior permission or charge. This item cannot be reproduced or quoted extensively from without first obtaining permission in writing from the copyright holder(s). The content must not be changed in any way or sold commercially in any format or medium without the formal permission of the copyright holders.

Pure is the Institutional Research Repository for Coventry University

## **Validation and virtuosity: Perspectives on difference and authorship/control in dance**

**Sarah Whatley**, Coventry University

**Charlotte Waelde**, University of Exeter

**Abbe Brown**, University of Aberdeen

**Shawn Harmon**, University of Edinburgh

### **Abstract**

This article brings together two different perspectives, dance and law, to ask questions about authorship and ownership in disabled dance. The focus is on Caroline Bowditch's short film project, *A Casting Exploration*, in which she is recast as the female dancer in a duet section from Joan Cleville's choreography for Scottish Dance Theatre, *Love Games*. We explore what medical law, human rights law and intellectual property law might say about Bowditch's role. We show how the film project raises questions about the aesthetic properties of the double duet, the politics of sameness and difference, and who can claim 'ownership' of the dance.

### **Keywords**

disability dance

copyright

authorship

ownership

law

wheelchair

human rights

## **Introduction: Improving on poor**

Numerous international legal and policy organizations and instruments declare that the right to participate in and to access culture and cultural works is a fundamental human right.<sup>1</sup> While the correctness of this position seems perfectly unchallengeable, the reality is rather more lamentable. As we have discussed elsewhere, impaired individuals' and groups' access to cultural works can be rather tenuous (Waelde et al. 2012). This results mainly from social and legal disabilities and limitations imposed on people who have physiological impairments and/or from the limits of technical solutions. With respect to providing more space and support for impaired *dance* artists, we have come some way in the United Kingdom and elsewhere; but advances have been in waves, as attention focuses on disability in connection with specific societal agendas or events (such as the Paralympic Games). Efforts and achievements to date have been:

- Growing arguments from the disability arts movement for the legitimization of disabled performers and greater transparency around the political imperatives within the performing arts community
- An expanding body of literature that considers inter alia the different models of disability and their impact on performance (Mitchell and Snyder 2006; Sandahl and Auslander 2005; Johnston 2012), and that engages critically with the experience and output of impaired dancers (Albright 1997; Benjamin 2002; Koppers 2003, 2005, 2011; Whatley 2007, 2010)
- Increased use of this research by dance writers, artists and commentators to bring disabled dance more firmly into view, to advocate for more opportunities for disabled dance artists and to argue for disabled dance to be seen as a serious arts practice as opposed to 'community dance' or 'therapeutic practice' and

- Greater attention to developing strategies to increase opportunities for disabled artists to access training for professional careers.<sup>2</sup>

Despite the above, there remains little evidence that disabled dancers are any more present in ‘mainstream’ dance than before, and there are few disabled dancers in positions of leadership. There is, however, a small and committed group of disabled choreographers emerging in the United Kingdom who are beginning to find more consistent support for their work from both outside and inside the community of disabled dance artists. Caroline Bowditch, Marc Brew and Claire Cunningham are all developing careers that have earned them commissions to choreograph for major dance companies. This is in addition to their work for the Unlimited Festival, a programme within the Cultural Olympiad celebrating arts, culture and sport by impaired people (Olympic.org 2013).

In this article, we examine a short film made by and featuring UK dancer and choreographer Caroline Bowditch. In addition to drawing attention to her career and to expanding the number of disabled dance practitioners whose work is subject to critical analysis,<sup>3</sup> we wish to anticipate and rehearse some of the questions that we will address in ‘InVisible Difference’, an AHRC<sup>4</sup>-funded project, which will explore a range of questions at the nexus of dance, disability, law and ethics.<sup>5</sup> The Bowditch film provides a lens through which we seek to expose our shared curiosities, and develop our common interest, in uncovering the experience of disabled dance artists and the conditions in which they work.

More specifically, we will examine the idea of authorship of dance. We aim to expose the general dearth of solid insight, which our disciplines offer to this concept, and to test accepted dance wisdom concerning legal authorship of the work, from which ownership, and, relatedly, control can flow. What could and should be done regarding the legal empowerment of the

disabled dancer? We begin with a detailed review of Bowditch's own pathway to the profession and an examination, from a dance perspective, of her work on the Pathways to the Profession Symposium for the Scottish Dance Theatre (SDT) in Dundee, Scotland.<sup>6</sup> We then consider what other perspectives - medical law and ethics, human rights and intellectual property - might say about disability, disabled dance and authorship, in the context of that project's dance and related film. While we conclude that the Bowditch dance exists quite apart from, and beyond, the present contributions of these disciplines, we also argue that they can, when applied creatively, suggest some support for the genre. Although this is inspiring from the perspective of disability and dance, it also makes clear the present inadequacies of law, ethics and the critical theory of dance.

### **Dance a measure, find your name**

#### ***Taking to the stage***

For Bowditch, dance began in Australia where she was told to 'do whatever you like' while the non-impaired dancers continued with class. Dissatisfied, she eventually found herself taking part in an extended workshop with Candoco Dance Company before moving to the United Kingdom and joining the SDT as a 'Dance Agent for Change' in 2008, under the visionary directorship of Janet Smith. Bowditch's inclusion constituted a landmark moment for a mainstream company, and she found herself able to articulate what was important to her work:

I think part of this new job is about looking at who says who can be a dancer and who says what a dancer is. I find dance so elite and exclusive and excluding, that I think if I'm on the inside of it then there's much more chance of me being able to hold open something that says 'Come on!' (see Sync Leadership 2011/2012)

By employing Bowditch, SDT seemed to have embraced the idea that her role was likely to rupture prevalent ideas about what defines a repertory company dancer's body; this follows Owen Smith's view that a disabled dancer's 'entry into the performative spectacle of theater dance disturbs the ground on which the dominant history of mainstream dance has been developed' (Smith 2005: 76). As an advocate for disabled dancers, and with the support of SDT, Bowditch as a wheelchair user found herself able to probe, question and subvert the corporeal and classical aesthetic of the western theatre dance tradition; this chimes with Paul Anthony Darke's claim that it is a 'culture rooted in the hegemony of normality' (2003: 137).

By January 2012, when she organized the Pathways to the Profession Symposium, Bowditch had established a significant profile for her work as activist, protagonist and developing dance leader, and increasingly as choreographer. That symposium was an important opportunity to reflect, draw attention to and review progress towards disabled artists finding routes into dance, and to make visible the opportunities that exist and the barriers that persist. The event featured many leading artists, researchers and teachers interested in dance and disability. It was here that Bowditch introduced the short film, *A Casting Exploration*, in which she features herself being recast as the female in a duet section of choreographer Joan Clevillé's *Love Games*.<sup>7</sup>

### ***An exploration of 'Recasting'***

In the film the two 'versions' of the duet run on-screen, side by side. The 'original' version features Naomi Murray and her male partner Jori Kerremans. In the second version, Bowditch is cast in the female role with the same male partner. The juxtaposition of two duets provides an opportunity to contemplate the shared aesthetic properties of the dance, the politics of sameness

and difference, and the processes of translation of a dance from the able bodied to the disabled. How might a viewer encounter a disabled dancer, particularly in the present context? Bowditch confronts this herself by asking, ‘Can a disabled dancer cover an able bodied dancer?’<sup>8</sup> The resulting film is a potent intervention: a useful provocation about how we look at disabled dance.

The duet in *Love Games* explores the dynamics of a male/female relationship that is playful and affectionate. In the Murray version, moments of gentle touching, embracing and lyrical lifts and swoops are interspersed with more dynamic confrontations. The dancing is marked by an easy fluidity, a spirited youthfulness and athleticism as the dancers move through a sequence of intricate entanglements. Murray fits the image of the ‘dancer’s body’; she is long-limbed, long-haired and graceful, with a femininity that is highlighted by the male partner, who is the stronger of the two, and who supports her and lifts her with ease. It generally upholds many of the conventions of a typically hetero-normative duet. The recasting of Bowditch imposes a new frame, which blurs traditional gender roles. The female ‘dancerly body’ is refracted through the very different physicality of Bowditch, who dances in her wheelchair. In many ways the recasting is a clear example of how to ‘translate’ a role from one dancer to another, but in so doing it exposes much more about the politics of translation and adaptation within mainstream theatre dance. The opening moment sees each woman lifted into an embrace by the man. What is striking is that Bowditch is just over three feet tall, so she resembles a child when held by her partner. But this image quickly dissolves as the duet continues, and her confident physicality as a wheelchair dancer resists any reading of youth, innocence or dependence.

The emphasis on verticality and linearity in the first duet gives way; the man moves more into and from the floor to negotiate new ways to partner Bowditch in her wheelchair, who refuses to be his muse. Bowditch’s wheelchair opens up a different kind of dialogue on the stage space.

Therefore, often a powerful signifier of disability/immobility, her wheelchair is now enabling, signifying mobility, independence and the power to support. Bowditch manoeuvres her chair with a technical virtuosity equal to the technical feats of the non-disabled dancers, integrating the chair into her dancing in a way that chimes with Ann Cooper Albright's description of Charlene Curtiss's dancing:

[Curtiss] claims the chair as an extension to her own body [and] revises the cultural significance of the chair, expanding its legibility as a signal of the handicapped into a sign of embodiment. (Albright 1997: 83)

Bowditch's *chair* acts as her partner, supporter and transporter. Her control of the chair diminishes the role of her male partner, thus making the male and female roles more equal. Although Bowditch's recasting may not be aimed at gender re-balance, their roles are exchanged as the duo engage in quirky, fluid and playful 'love games'. At one point, Kerremans takes on what was Murray's role, appearing to nearly lose his balance, centre stage. Meanwhile Bowditch takes on Kerremans' role and wheels herself in a large circle, resolving with her catching his weight as he appears to fall back into her. As a reversal of the vulnerable woman saved by the man in Murray's version, Bowditch is the one who saves, refuting any suggestion of weakness. Murray's version concludes with the rest of the ensemble entering and interrupting the duo onstage, and she moves away from her partner; Bowditch's ends with the duo alone on the stage. She turns first towards and then away from the audience and moves in a lilting pathway upstage as the man stands away, leaving the space to Bowditch. It has a wistful quality, but she seems neither forlorn nor abandoned.



The two very different women's bodies viewed together in the film make each other more interesting. Variation in tone and amplitude is made more vivid; softly pedalling feet and subtle gestures and handholds are more visibly delicate and texturally layered in each of the paired films. In short, it reinforces the differences between the women's roles while retaining the integrity of the choreographic intention. The film – with its two versions running simultaneously – also recalls, however fleetingly, those works where there is a conscious play on the opposing states of vulnerability and strength, such as Trisha Brown's solitary quest in *If You Couldn't See Me* (1994), or Jerome Bel's questioning of the nature of dance in *Veronique Doisneau* (2004). And by drawing attention to her own subjectivity by foregrounding her own bodily difference and her experience of that difference through dancing with another, Bowditch invites more attention to the individual subjectivities and agency of the other dancers too. In her willingness and desire to be cast in the role, Bowditch seems able to express what she sees, feels and experiences as a dancer previously excluded from roles in mainstream dance such as *Love Games*. In this regard, we might ask: Is the story that Bowditch and her partner are telling the same story that Murray and her partner are telling? In other words, is it the same story differently expressed, or is it now a different story with different messages?

### ***What the recasting is and isn't***

It might be easy to read Bowditch's performance as 'brave', 'heroic' or 'courageous', with Bowditch dancing 'about' her bodily impairments to 'overcome' her disability and to dance a role otherwise always performed by a non-disabled performer. However, we would argue that Bowditch's work has nothing to do with Darke's claim about 'heroic works that assert the potential normality of disabled people to fit in; overcoming their disabilities' (2003: 133). Nor do

we believe that Bowditch is in this project setting out to align herself with the philosophy of Disability Art, which, according to Darke, 'is a challenge to, an undermining of (as a minimum), traditional aesthetic and social values' (2003: 132). We also do not perceive any apparent indication that Bowditch has a desire to be assimilated into the 'established tradition' (Darke 2003: 138). Her performance and different physicality does, however, raise interesting questions about the concept of virtuosity in performance and blurs the relationship between the virtuosic *creation* and virtuosic *performance* of a work.

According to music historian and practitioner Nicholas Till, who contemplates the relationship between virtuosity and virtue, virtuosity might be thought of as 'ground, because you have to have the skill, the technique, and the know how before you can do anything; or it may be surface, that which is added on, it may be supplementary' (2003: n.p). In Bowditch's performance, and more specifically in the recasting project, she questions the distinction between ground and surface, not least because in her performance we witness a dancer who eschews conventional assumptions about what virtuosity means with respect to the traditional gendered image of the female dancer. She performs no excessive displays of athleticism, liveness, flexibility or muscularity that might be ordinarily associated with virtuosity in dance. Rather, her dancing performs what might be seen as a critique of virtuosity, expounding what theatre practitioner and scholar Margaret Ames describes as 'a new terrain of expression ... and so makes a new claim on the territory of the virtuoso' (2012: 153) that the non-disabled virtuoso is unable to produce (Ames 2012: 143).

Ames invokes the theatre practitioner and scholar Eugenio Barba's notion of the *extra-daily* in a close reading of one performer in particular, Edward Wadsworth, who is a member of a community dance group that she leads in Wales, Cyrff Ystwyth. Members of the group have

various disabilities; Wadsworth is a member with cerebral palsy and learning difficulties. Barba is a key reference point for Ames throughout her article, and the *extra-daily* provides her with a focus for thinking about virtuosity, which she outlines as when the daily (the daily techniques we are not conscious of, which we assume are natural but which, in fact, are culturally determined) becomes extra-daily by not respecting the habitual conditionings of the body (2012: 145).<sup>9</sup> Ames is careful to point out that ‘Wadsworth is not an artist yet’<sup>10</sup> (2012: 152), meaning that he is not a dance professional. But she offers a persuasive account of how virtuosity is revised when considered in relation to a disabled performer, arguing that Wadsworth, working in his wheelchair, ‘opened new portals of aesthetic intervention, demanding to be seen; he illuminated possibilities of a new virtuosity’ (2012: 151). Later she adds,

It is precisely because of his specific body and extra-daily practice that Wadsworth’s performance takes on its own particular version of the virtuosic. It is crafted through internalizing principles of extra-daily technique, and the performer turns his daily disability, the marker of his social interpellation as disabled subject, into an action of surprise, shock, and delight, and of passion and tension in performance. ... However, this virtuosity cannot be transmitted to other performers, nor is it repeatable, as it depends on this particular disabled performer. (2012: 153–54)

In a similar way, Bowditch’s unique body forces us to rethink the assumed association of physical impairment with limitation, loss or weakness, which might be seen to preclude a display that reaches beyond, towards the *more-than*, the outstanding. But Bowditch, as an established dance artist, might be seen to have more to prove than Wadsworth when it comes to virtuosity, to both

herself and her audiences. It is in her intention to be seen in equal but different terms to Naomi Murray that virtuosity is effectively reframed within a ‘new and radical aesthetic’ (Ames 2012: 143). Bowditch’s performance is remarkable in part *because* of her disability but is not limited to it, and results in her inaugurating a virtuosic relationship with her partner, and as noted earlier, her wheelchair. Hence, Bowditch’s performance, both live and on-screen, explores what is acceptable in dance terms for the ‘main stage’, and she reveals something of her own identity as a dance artist. She stakes her claim to be there by exposing the problematic assumption that disability cannot be playful and purposeful and that virtuosity is limited to particular dance practices and body types. Moreover, her performance might also be seen to contribute to a wider ‘disability theatre aesthetic’, which, according to Kirsty Johnston, ‘challenges conventional representations of disability onstage, impacts the development process, and seeks to re-construct the social meanings of disability’ (Johnston 2012: 173). Prefixing ‘identity’, ‘politics’, ‘art’ and ‘culture’ with the label ‘disability’ might reinforce difference, but that difference can be positive provided that it accepts and celebrates diversity of practice.

### ***What the recasting means***

Rather, the film and dance illustrate and address another issue that plagues ‘disability dance’: the inability to escape an inherent dualism that defines what it is. Forever trapped in the binary of disabled/non-disabled, inclusion/exclusion, object/subject, visible/invisible, dancers with impairments are disabled by categories such as ‘integrated’, that signal a different kind of performance experience for dance audiences; disabled dancers might rather seek to refute, challenge or remove this altogether. The simulcast in the film and Bowditch’s recasting as the ‘other’ in *Love Games* might be said to reinforce an *othering* in its deviation from normalcy that

so often cloaks the male/female duet form in dance. The recasting draws attention to Bowditch's uniqueness; she is a wheelchair dancer with a movement range that is determined and shaped by her unique bodily capacity.

Importantly, the doubling acts as a mirror; each duet reflects on the other to reveal what was concealed or unintended in the other, to the point where each is 'other'. Each dancing body is inscribed differently because what might have appeared to be the neutral, able and substitutable body of Murray is, in fact, 'equally different' when viewed against Bowditch's body. Moreover, when the dance is so clearly marked by Bowditch's singular physicality, the distinction between 'choreography' and 'performance' is diminished; her unique bodily engagement with the duet material reflects back on the choreographic process and asks if it is not necessary to reconceptualize the choreographic intention. This begs the question: What is authorship in dance, and who is the author of this dance?

While Bowditch's *apparent* 'ownership' of the recasting exploration suggests that the choreographer might have had a different relationship with Bowditch than with Murray, the former's aim of 'covering' the role might undermine a claim to individual ownership by her. Indeed, Bowditch is *not* laying claim to the dance as 'her dance' but rather claims her place as dancer of 'the role' that honours her own embodied experience and yet exists beyond and separate from her.<sup>11</sup> Bearing these ambiguities in mind, we move to the section, which considers Bowditch's dance from a number of legal perspectives.

### **The dance of life (and law)**

For present purposes, the legal perspective is important for a number of reasons. First, to what extent has the law contributed to the visibility of disabled artists through its treatment of

those who make and perform dance works, and could it do more? Second, the 'InVisible Difference' project is, in part, about bringing dance and legal perspectives together for mutual support and learning. Third, the question identified as emerging from Bowditch's recasting regarding authors and authorship is a question on which the law traditionally has something to say: Is the legal message sufficiently loud and clear? Those areas which we consider most relevant and which we will explore here are, as introduced above, medical law and ethics, human rights law and intellectual property law. We will analyse the contributions that these areas of law make to the relationship between dance made by disabled people, and authorship and control of this work. In doing so, we uncover what dance made by disabled people reveals *about* those fields of law.

### ***Medical law: Blindness***

We begin with medical law because, perhaps unsurprisingly, while it does concern itself with disability, it has the least to say about authorship (and dance). While medical law is broadly aimed at human well-being, it concerns itself primarily with instrumental issues such as individual capacity, appropriate modes of consent and patient's best interests. Medical law considers 'control' from a narrow perspective. Particular examples are decision-making in treatment, and the accessibility and allocations of responsibility with respect to resources such as cadavers, organs and tissue. This is due, in part, to how medical law constructs its constituents; actors are doctors, nurses, National Health Service (NHS) Trusts, families and patients, the latter of whom are to be 'helped' through often complex interactions with health care providers, health system administrators and health researchers.

Adopting a 'medical model' of identity and well-being, medical law casts impairment as a

physiological deviation from the norm. It casts impaired individuals as sufferers of a personal tragedy who must be treated (or otherwise brought more in line with the rather narrow characterization of ‘normal’ or ‘healthy’), and it erects standards for decision-making and service-providing on that basis. Importantly, this medical model of person-identification and interaction, whereby we *become*, or become defined and constrained by, our physiological condition or limitation is widely adopted in society. According to this model, Bowditch would be seen as a ‘patient’ - possibly a patient who, given her potential need for ongoing support of a more technical or architectural nature, is beyond the existing remit of most health systems - or as a person who is ‘not quite whole’.

However, social research with disabled populations has found that, rather than a demand for cures or prenatal screening programmes to identify birth defects, which are the occupational emphases within medicine, these populations exhibit a strong solidarity among communities with like impairments and a desire for a better *situation* (Goering 2008). All of this offers some clues as to why medical law has little resonance with disability.

In this pursuit of ‘a better situation’, medical law’s theoretical/philosophical partner, bioethics, might be expected to play a larger role; bioethics is, after all, about ‘ethics’ as it relates to the ‘biological’. Unfortunately, once again, little insight is forthcoming. To the extent that bioethics has addressed impairment and disability, it, like its more instrumental partner, has done so from a rather narrow value perspective to which it is itself blinkered (Koch 2006). Bioethicists have been criticized for either ignoring or misunderstanding disability and the rich literature that has emerged around it (Amundson and Tresky 2007, 2008). Bioethical institutions have, it is argued, exhibited a reticence to accommodate impairment because it would be both burdensome to ‘mainstream society’ and also contrary to the fundamental conceptions of health and capacity at

which health care is aimed (Amundson and Tresky 2008). Such a reality has led to arguments that:

[W]e must overcome the idea that the study of ethical issues relating to disability must be left to the disabled alone. Although we should never seek to usurp the right to speak for any disenfranchised group, the failure to engage in dialogue with that group about issues of concern is a ... serious problem. (Kuczewski 2001: 42)

Despite this admonition, engagement with disability remains minimal, a sorry fact which we hope our work will rectify at least in some small part; our exploration of virtue and virtuosity could well be taken up as a means to expand the value base on which bioethics and the ethics of the body sit.

### ***Human Rights law: Myopia?***

The contribution of human rights might seem more promising, or at least relevant. As we noted at the outset, the right to participate in and to access culture and cultural works is recognized as a fundamental human right in international instruments (see note 1).<sup>12</sup> But when considered against *A Casting Exploration*, human rights law is revealed as a rather restricted system, which has not yet engaged with the new freedom that is seen in, and can come from the creativity of Bowditch.

A supporter of human rights law might consider this to be quite appropriate. Although many different theories, philosophies and declarations supporting human rights can be traced far back in time,<sup>13</sup> the present set of human rights instruments stem from the aftermath of World War II and a determination that obligations would be imposed on states to ensure that atrocities against



humankind should not happen again.<sup>14</sup> From this perspective, it should not be expected that human rights would explicitly address questions of dance, disability, creativity and shifting boundaries. Likewise, some with disabilities face more significant daily challenges than those associated with the appreciation of or involvement in dance.<sup>15</sup>

But public sentiment and societal perceptions of value evolve; events such as the Paralympics may mean that it is appropriate to now review all opportunities of persons with disabilities. A base from which this might develop is the International Covenant on Economic Social and Cultural Rights (1966),<sup>16</sup> which in addition to recognizing the right of everyone to take part in cultural life,<sup>17</sup> also includes a right of authors to benefit from the protection of moral and material interests from their work.<sup>18</sup> The UN's Committee on Economic Social and Cultural Rights issued a General Comment on cultural life in 2009.<sup>19</sup> It recognizes that the idea of culture is evolving (par. 11) and that it covers non-verbal communication (par. 13). It refers to disability in relation to accessibility (par. 16(b) and 30–31), and there is a general reference to non-discrimination (par. 21, 22) and to 'the encouragement and promotion of ... participation, to the extent possible, in recreation, leisure, and sporting activities' (par. 31). Another international treaty, the International Covenant on Civil and Political Rights 1966,<sup>20</sup> enumerates a right to freedom of expression and information, which would encompass dancers and those who wish to share in the dance (Article 19 ICCPR). A greater focus on disability in the human rights framework came with the Convention on the Rights of Persons with Disabilities (2006; see United Nations Enable 2006), which imposes explicit obligations on states to ensure that persons with disabilities can participate in the creation of culture through creative, artistic and intellectual activities.<sup>21</sup>

Yet what does this mean for dancers with a disability, or those who would or could like to

share in such dance? These human rights obligations are imposed on states – not individuals. If states do not provide sufficient opportunities for the creation of and participation in culture and expression, how can the rights be exercised by the individual? This is the real practical challenge for human rights, and when states do fail to implement obligations and provide the means for individuals to exercise rights, the routes to redress are long, largely impractical and potentially futile.<sup>22</sup> The reality of recourse to human rights may thus be illusory. Human rights can be used in rhetoric and activist argument, towards a greater contribution to dance and disability. But even here any practical outcomes might be fanciful. Is there then a more immediate legal avenue to be found in intellectual property?

### ***Intellectual property law: Lifting the veil?***

Here, we surely can expect ready answers; what amounts to authorship of dance, and what level of control the related right of ownership affords, are questions that one form of intellectual property, copyright law, might be expected to answer. What might be less obvious, however, is how copyright relates to disability.

In the United Kingdom, the governing legislation is the *Copyright Designs and Patents Act 1988* (CDPA). This provides that the ‘author’ is the first owner of a dance unless the author is acting as an employee in the course of employment, in which case the employer is the owner.<sup>23</sup> The ‘owner’ is the person who can control the dance in the sense that he or she can control exploitation (i.e. the ways in which a dance can be reproduced,<sup>24</sup> adapted,<sup>25</sup> and further disseminated to the public<sup>26</sup>). Of course, this trite answer glosses over pertinent questions, which are highly relevant to dance, and more specifically, dance made by disabled people. While dance was first formally recognized in UK copyright legislation in 1911, there have been only three

cases where dance has been judicially considered.<sup>27</sup> This dearth of jurisprudence, combined with the general absence of legal academic literature,<sup>28</sup> makes this a little understood area of the law. It also means that we must resort to first principles and analogies when considering the present case. First - and this, of course, makes clear the artifices inherent in law and the gaps between law and reality - for copyright to exist there must be a 'work'. There are three key criteria for the subsistence of copyright in a work:

1. *Initial Definitional Category*: A work must fall into one of the categories set out in the CDPA.<sup>29</sup> One category is 'original dramatic works', which includes dance or mime.<sup>30</sup> To be a 'dance', a work must be capable of being performed, but neither the statute nor the jurisprudence tells us any more than that. The issue becomes more complex when one notes that even those within the dance community are not in agreement about a definition of dance.<sup>31</sup> Further, the criterion of needing to fall into a particular category was itself called into question in 2009 by what was then termed the European Court of Justice (ECJ), the highest court able to adjudicate on these copyright questions.<sup>32</sup> The ECJ stressed that the European copyright scheme (which is based on obligations in international treaties) provides that works are to be protected where the subject matter is original in the sense of being the author's intellectual creation;<sup>33</sup> what matters is *not* that something falls into a particular category or is given a particular name (e.g. dance), but that there *is* a work of the author's own intellectual creation. This development is unlikely to disturb the previous finding that a dramatic work has to be capable of being performed,<sup>34</sup> but it could bring more creations under copyright's protective mantle, which is likely in turn to be relevant to dance in its many potential forms.<sup>35</sup>

2. *Originality*: The second criterion is that there must be the appropriate creative effort or originality present in the work.<sup>36</sup> Historically, the law only required that a work not be copied, but no more than skill, judgement or labour needed to be expended in its creation.<sup>37</sup> What skill is applied must be relevant to the work as it is expressed, rather than to the idea behind the work, which remains unprotectable.<sup>38</sup> Such was the low level of originality required in the United Kingdom that few works had been denied the status of a ‘work’ for want of originality. However, recent ECJ jurisprudence suggests that the originality requirement may be changing. A series of ECJ cases, taken together, means that the level has been raised (for the United Kingdom) to one of ‘intellectual creation’, whereby the author expresses her creative ability in an original manner by making free and creative choices and thus stamps her ‘personal touch’ on the work.<sup>39</sup> Where choices are dictated by technical considerations, rules or constraints, which leave no room for creative freedom, this criterion will not be met.<sup>40</sup> But in any event, law has little connection to debates within the dance community and beyond regarding the place of subjective aesthetic elements and views in determining what constitutes a dance.
3. *Fixation*: The third requirement for copyright in the United Kingdom is that the work be fixed in some material form.<sup>41</sup> Traditionally, and reflecting the historical text-based roots of copyright law, fixation has been thought of as being in writing.<sup>42</sup> For dance, one of the notation systems such as Laban or Benesh might be deployed, both of which have relatively recent origins in the mid-twentieth century.<sup>43</sup> More modern examples of dance fixation might include film and video, computer animation, motion capture and holography.<sup>44</sup> Yet, while

these methods might ‘fix’ the work, they may not capture the essence of the dance. Thus, fixation may too easily be assumed. Choreographers voice different opinions as to what amounts to fixation and the extent to which the requirement is apt for dance. Some view dance’s fugitive nature as presenting particular problems for capture; others argue that the technicalities of the art form occupying both space and time is too challenging for fixation (Cook 1977: 1287; Yeoh 2012); others assert that the dance is fixed in the ‘memories and bodies of the dancers’, where the bodies are considered material objects (Traylor 1981: 237); others claim that the idea of any form of record is an anathema: the dance is meant to be ephemeral and fixation ossifies the work (Théberge 2004).

So what of the dance performed by Bowditch: does it meet the requirements for copyright protection? Considering the categories discussed above, we can say the following:

- The dance is clearly a ‘work’ for purposes of copyright law, and, if the category still exists, it is a work of dance.
- Creative ability has been applied and expressed in the work in an original manner through making free and creative choices.
- Whatever may be thought of the fixation requirement, this dance, or at least the parts that are available on YouTube, have been fixed in a form that is sufficient to meet the fixation criterion.

But *who* is the author? *Who* has expressed this creative ability and stamped their personal touch on the work?

## Dance, copyright and authorship

There is a clear assumption in the dance community that the choreographer is the author and first owner of copyright in the work; this comes through in interviews with choreographers (Waelde and Schlesinger 2011) and in literature by and about choreographers.<sup>45</sup> The one UK case to have considered the question, *Massine vs de Basil*,<sup>46</sup> was decided under the 1911 Act, which included a reference to ‘choreographic work’.<sup>47</sup> In contrast, the CDPA says nothing about choreography, though it does provide that a dramatic work includes dance. So is a choreographer an author under the CDPA? Or is a dancer an author? Or perhaps both are authors in law?

Choreography has been defined as the composition and arrangement of dance movements and patterns, whereas the dance itself (i.e. the performance) has been defined as static and kinetic successions of bodily movement in certain rhythmic and spatial relationships.<sup>48</sup> Choreography thus seems apt to be considered as a work and protected by copyright, but is that always the case? It is reported that Joan Clevillé stated that his intention with *Love Games* was to ‘translate the movement and the dramaturgy of the dance to a new body’, and thus he focused on the emotional and physical intentions behind the movement rather than the form as originally conceived or expressed (2011). From the copyright perspective, this sounds more like the unprotectable idea than the protectable expression. Is there, then, authorial input into the *performance* of the work by Bowditch such as to render it capable of being protected by copyright?

Here the cases concerning copyright in music can be useful by analogy. In music, copyright can subsist in an original musical composition,<sup>49</sup> and a separate copyright can exist in an arrangement of the composition so long as the correct type of originality has been expended.<sup>50</sup> While there remains a question over unprotectable choreographic ideas and protectable

expression, the above-offered definition of choreography suggests that generally the tasks of composition and arrangement both fall to the choreographer. While the choreographer may compose the dance, why can the dancer not be considered as an arranger of that composition? The dance may be ‘placed on the body’ by the choreographer,<sup>51</sup> but is there not room for authorial intent by the dancer in the arrangement of the dance through her body sufficient for copyright?<sup>52</sup> We think, yes. This is particularly so if we look at Bowditch’s virtuoso interpretation (in copyright terms – arrangement) of the dance; she interprets Clevillé’s choreographic intent (in copyright terms composition), but the result is visibly different from that performed by Murray; Bowditch’s personal touch is stamped on her *arrangement* of the dance on her body in *Love Games*.

At this point it is instructive to note that copyright law has nothing to say about disability in authorship.<sup>53</sup> It treats all authors the same, looking only for authorial input sufficient to satisfy the legal tests. But in juxtaposing those legal tests with the very particular contribution made to *Love Games*, we believe that the claim that Bowditch is the author of the work in the arrangement is strengthened *precisely because* she is disabled: only Bowditch is capable of contributing the intellectual creation necessary to make this dance a success, because only Bowditch knows precisely how her body can interpret and fix (arrange) the choreographic intent.<sup>54</sup> Bowditch’s somatic knowledge is uniquely her own. A choreographer would struggle to give directions to her on how to achieve a particular outcome: how could a choreographer give instructions to Bowditch to express exuberance for example? A jump to express this emotion would be possible for the able-bodied dancer, but not for Bowditch. Copyright law is blind to Bowditch’s subjective intention only to ‘cover’ the role and deaf to her claim that she is not the legal author of the copyright in the arrangement of the dance, with Clevillé being the legal author of the copyright in the composition.<sup>55</sup>

What would the consequences be of these arguments? Ownership of copyright flows from authorship: the first owner of the copyright in a work is an author unless there is an employment arrangement or an agreement to the contrary. Copyright is a property right and thus with ownership come rights (and responsibilities) and powers (and obligations). Once the law recognizes ownership, applying the principles discussed, it does not distinguish between different types of owner. Therefore, Bowditch's ownership of the copyright in the arrangement of the dance is equal to Cleville's ownership of the copyright in the composition. This equality could be an important factor in the transition from exclusion and othering to inclusion and normalcy. This could then result in the transition from the marginalization of dance made by disabled people to the embracing of the art form and recognition of the (disabled) dancer as a valued and valuable participant in and an equal owner of our cultural heritage.

## **Conclusion**

The disabled dancer often finds herself in a paradoxical position where she wants to be viewed on her own terms without being defined by her disability, equal to and the same as any other company dancer. Yet it is also clear that her disability might become for her a political act, a radical statement about the legitimacy of otherness within a performing art form that so easily reverts to a classical aesthetic; thus, her disabled body must remain visibly different. Moreover, in the case of Bowditch's role with SDT, the proscenium arch stage within the culture of a mainstream repertory dance company is replete with convention that dictates the way in which the dance is viewed. Within this aesthetic framework, it is inescapable that the disabled dancer will be viewed as *other*. Yet Bowditch's project acts as an interstice, forcing the viewer to pause and question these dualities and how they shape the way we look at and judge the dance. Bowditch's



project's fluidity of roles and contributions also forces us to assess the claims that the different parties - choreographer, dancers, other contributors - have on the authorship of the work. Just as adaptations needed to be made to the choreography, the dancers have to remake their work and accommodate changes to their working situation, such as adapting to a wheelchair onstage. Similarly the viewer will have expectations that may be challenged by a new cast and which can lead to disturbing misreadings such as that of the dance critic Michael Scott in his much cited review of Candoco in 1999.<sup>56</sup> Each contributor will need protection or should receive benefit for their work. With respect to the law we have seen that bioethics fails to account adequately for impairment/disability and has nothing to say about authorship of dance. Further, while some relevant human rights exist in respect of authorship, expression and cultural life, they have not been explored or used in relation to dance and disability. Even the most directly pertinent regime - copyright - contains uncertainties in relation to authorship and makes no explicit mention of disability in authorship.

This article has developed a new approach within copyright to attribution of authorship and legal ownership of dance. Human rights rhetoric can, as noted, encourage new approaches to the reward of dancers with disabilities, and to the provision of opportunities for others to observe and share in their work. Bioethics has perhaps the furthest to go to accommodate disability and dance, but the seeds have been sown. But yet more shifts are required - cultural, social and ethical - to enable the widespread acceptance of dance made by disabled dancers as part of our mainstream cultural heritage. It is therefore incumbent on us to combine an in-depth analysis of dance and the disabled dancer with an exploration and development of the legal and ethical perspectives. This will enable us to develop a persuasive and compelling narrative sufficient to deepen and broaden our understanding of the barriers to full and equal participation in and

ownership of dance, and of the new paradigms towards which we should move in our cultural life.

## References

Albright, Ann Cooper (1997), *Choreographing Difference: The Body and Identity in Contemporary Dance*, Hanover: Wesleyan University Press.

Alfredsson, Gudmundur (2009), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Moller*, the Netherlands: Martinus Nijhoff.

Ames, Margaret (2012), 'Performing between intention and unconscious daily gesture. How might disabled dancers offer us a new aesthetic sensibility?', *About Performance*, 11, March, pp. 143–158.

**Comment [KW1]:** This is the issue number, no volume number. This is the reference as it is on Margaret Ames publications page

Amundson, Ron and Tresky, Shari (2007), 'On a bioethical challenge to disability rights', *Journal of Medicine & Philosophy*, 32:6, pp. 541–61.

\_\_\_\_ Amundson, Ron and Tresky, Shari (2008), 'Bioethics and disability rights: Conflicting values and perspectives', *Bioethical Inquiry*, 5, pp. 111–23.

**Comment [H2]:** This is the full reference as it is on R. Amundson's publication page.

Arnold, Richard (2010), 'Reflections on "The triumph of music: Copyrights and performers' rights in music', *Intellectual Property Quarterly*, 2010:2, pp. 153–64.

\_\_\_\_ (1999), 'Are performers authors? Hadley v Kemp', *European Intellectual Property Review*, 21:9, pp. 464–69.

Barba, Eugenio and Savarese, Nicola (1991), *The Secret Art of the Performer: A Dictionary of Theatre Anthropology*, London and New York: Routledge.

Benjamin, Adam (2002), *Making An Entrance; Theory and Practice for Disabled and Non-Disabled Dancers*, London: Routledge.

Bentham, Jeremy (1963), *An Introduction to the Principles of Morals and Legislation*, New York: The Hafner Library of Classics Hafner Publishing Co.

Brown, Abbe (2012), *Intellectual Property, Human Rights and Competition: Access to Essential Innovation and Technology*, Cheltenham: Edward Elgar.

Clevillé, Joan (2011), 'Love games at the Pathways to the Profession Symposium', 1 April 2012, Available at: <[joancleville.blogspot.co.uk/2012/04/love-games-at-pathways-to-profession.html](http://joancleville.blogspot.co.uk/2012/04/love-games-at-pathways-to-profession.html)> [Accessed 3 March 2015]

Cook, Melanie (1977), 'Moving to a New Beat: Copyright protection for choreographic works', *UCLA Law Review*, 24, pp. 1287–312.

**Comment [KW3]:** This is the reference as it is cited elsewhere. It is the full reference.

Darke, Paul Anthony (2003), 'Now I know why disability arts is drowning in the River Lethe (with thanks to Pierre Bourdieu)', in Sheila Riddell and Nicholas Watson (eds), *Disability, Culture and Identity*, Harlow: Pearson Education, pp. 131–42.

Donders, Yvonne and Volodin, Vladimir (2007), *Human Rights in Education, Science and Culture: Legal Developments and Challenges*, UNESCO Hampshire, UK and Burlington, VT, USA: Publishing and Ashgate.

Dworkin, Ronald (1977), *Taking Rights Seriously*, London: Duckworth.

Eide, Asbjorn, Krause, Catarina and Rosas (2001), *Economic, Social and Cultural Rights*, the Netherlands: Martinus Nijoff.

Fagan, Andrew (2011), *Human Rights: Confronting Myths and Misunderstandings*, Cheltenham: Edward Elgar.

Galligan, Brian and Stampford, Charles (eds) (1997), *Rethinking Human Rights*, Sydney, Australia: The Federation Press.

Goering, Sara (2008), "'You Say You're Happy, But ...': Contested quality of life judgments in bioethics and disability studies', *Bioethical Inquiry*, 5:2-3, pp. 125–35.

Ignatieff, Michael (2001), *Human Rights as Politics and Idolatry*, Princeton, USA: Princeton University Press.

Johnston, Kirsty (2012), *Stage Turns: Canadian Disability Theatre*, Montreal & Kingston: McGill-Queen's University Press.

Jowitt, Deborah (1988), *Time and the Dancing Image*, Los Angeles: University of California Press.

Koch, Tom (2006), 'Bioethics as ideology: Conditional and unconditional values', *Journal of Medicine & Philosophy: A Forum for Bioethics and Philosophy of Medicine*, 31:3, pp. 251–67.

Kuczewski, Mark (2001), 'Disability: An agenda for bioethics', *American Journal of Bioethics*, 1:3, pp. 36–44.

Kuppers, Petra (2003), *Disability and Contemporary Performance; Bodies on Edge*, London: Routledge.

\_\_\_\_ (2005), *Sirens: Performance Technology, Community Dance and Disability Embodiment*, Congress On Research in Dance, Florida State University, 7–10 March.

\_\_\_\_ (2011), 'Butoh Rhizome: Choreography of a moving writing self', *Choreographic Practices*, 1:1, pp. 79–96.

Lepecki, Andre (2006), *Exhausting Dance: Performance and the Politics of Movement*, Abingdon: Routledge.

Locke, John (1994), *Two Treatises of Government*, New York: The Legal Classics Library.

McFee, Graham (2011), *The Philosophical Aesthetics of Dance: Identity, Performance and Understanding*, Alton: Dance Books.

Miller, Alan (2012), 'Getting it right? Human Rights in Scotland', [scottishhumanrights.com/publications/journal](http://scottishhumanrights.com/publications/journal). [Accessed 29 January 2014]

Mitchell, David and Snyder, Sharon (2006), *Cultural Locations of Disability*, Chicago: University of Chicago Press.

Office of the United Nations High Commissioner for Human Rights, 'Status of ratifications of the Principal Human Rights Treaties as of 14 July 2006', Available at: [www2.ohchr.org/english/bodies/docs/status.pdf](http://www2.ohchr.org/english/bodies/docs/status.pdf). [Accessed 3 March 2015]

Oliver, Michael (1996), *Understanding Disability: From Theory to Practice*, New York: St. Martin's Press.

Olympic.org (2013), 'Commission for Culture and Olympic Education', [london2012.com/about-](http://london2012.com/about-)

**Comment [H4]:** This needs to remain as it is. It is not a publication so doesn't have a publication date. It's just a list of states who have signed up to the legislation as per 14 July 2006 so the date must remain as such.

[us/cultural-olympiad/unlimited](http://us/cultural-olympiad/unlimited). [Accessed 26 January 2014]

Osiatynski, Wiktor (2009), *Human Rights and their Limits*, Cambridge and New York: Cambridge University Press.

Rawls, John (1972), *A Theory of Justice*, Clarendon Press: Oxford.

Riddell, Sheila and Watson, Nicholas (2003), *Disability, Culture and Identity*, Harlow: Pearson Education.

Sandahl, Carrie and Auslander, Philip (2005), *Bodies in Commotion Disability and Performance*, Ann Arbor: University of Michigan Press.

Smith, Owen (2005), 'Shifting Apollo's frame – challenging the body aesthetic in theater dance', in Carrie Sandahl and Philip Auslander (eds), *Bodies in Commotion Disability and Performance*, Ann Arbor: University of Michigan Press, pp. 73-85.

Symonides, Janusz (ed.) (2000), *Human Rights: Concepts and Standards* (M.A.), USA: Dartmouth Publishing Co and UNESCO.

Sync Leadership (2011/2012), 'Caroline Bowditch', [www.syncleadership.co.uk/?location\\_id=175&item=15](http://www.syncleadership.co.uk/?location_id=175&item=15). [Accessed 26 January 2014]

Théberge, Paul (2004), 'Technology creative practice and copyright', in Simon Frith and Lee Marshall (eds), *Music and Copyright*, 2nd ed., Edinburgh: Edinburgh University Press, pp. 139, 140.

Till, Nicolas (2003), 'It's good for you, the virtue of virtuosity', [sfmelrose.org.uk/e-pai-2003-04/nicktill](http://sfmelrose.org.uk/e-pai-2003-04/nicktill). [Accessed 23 January 2014]

Traylor, Martha (1981), 'Choreography, Pantomime and the Copyright Revision Act of 1976', *New England Law Review*, 16:2, pp. 227–55.

United Nations Enable (2006), 'Convention on the rights of persons with disabilities', [un.org/disabilities/convention/conventionfull.shtml](http://un.org/disabilities/convention/conventionfull.shtml). [Accessed 29 January 2013]

Van Camp, Julie (1994–1995), 'Copyright of choreographic works', in Stephen F. Breimer, Robert Thorne and John D. Viera (eds), *Entertainment, Publishing and the Arts Handbook*, New York: Clark, Boardman and Callaghan, pp. 59–92.

Verrent, Jo (2010), 'Dance agent for change: Impact report', October, [issuu.com/scottishdancetheatre/docs/dance\\_agent\\_for\\_change\\_impact\\_report?mode=window&pageNumber=2](http://issuu.com/scottishdancetheatre/docs/dance_agent_for_change_impact_report?mode=window&pageNumber=2). [Accessed 26 January 2014]

Waelde, Charlotte and Schlesinger, Philip (2011), *Music and Dance: Beyond Copyright Text?*, *SCRIPTed*, 8:3, pp. 257–91.



Waelde, Charlotte, Harmon, Shaun and Brown, Abbe (2012), 'Do you see what I see? Disability, technology, law and the experience of culture', *International Review of Intellectual Property and Competition Law (IIC)*, 43:8, pp. 901–30.

Whatley, Sarah (2007), 'Dance and disability; the dancer, the viewer and the presumption of difference', *Research in Dance Education*, 8:1, pp. 5–25.

\_\_\_\_ (2008), *Moving Matters: Supporting Disabled Dance Students in HE*, Coventry: Coventry University, CeMAP, Centre for Media Arts and Performance/Palatine, <http://78.158.56.101/archive/palatine/files/movingmatters.pdf> [Accessed 3 March 2015].

\_\_\_\_ (2010), 'The spectacle of difference; dance and disability on screen', *International Journal of Screendance*, 1:1, pp. 41–52.

Yeoh, Francis (2012), 'Copyright Law does not adequately accommodate the art form of dance', Ph.D. thesis, London: Birkbeck College, pp. 96–100.

### **Complete case list**

*Anacon vs Environmental Research* (1994) FRS 359

*Austin vs Columbia* (1917-1923) MacG CC 398

*Bach vs Longman* 98 ER (1777) 1274

*Beckingham vs Hodgens* (2002) EMLR 45

*Bezpečnostní Softwarová Asociace*, Case C-393/09 (ECJ)

*Brigid Foley vs Elliot* (1982) RPC 433

*Fisher vs Bocker* (2009) UKHL 41

*Football Association Premier League and others*. Joined cases C-403/08 and C-429/08 (2011) ECR I-0000

*Football Dataco vs Sportrader* Case C-173/11

*Godfrey vs Lees* (1955) EMLR 307

*Hadley vs Kemp* (1999) EMLR 589

*Holland vs Vivian Van Damm Productions Ltd* (1936-1945) MacGillvray Copyright Cases 69-77

*Case C-5/08 Infopaq International A/S vs Danske Dagblades Forening* (2009) ECR I-6569 (ECJ)

*Ladbroke (Football) Ltd vs William Hill (Football) Ltd* (1964) 1 WLR 273

*Massine vs de Basil* (1936–1945) MacG CC 223 (CA)

*Norowzian vs Arks Ltd & Ors* (1999) EMLR 67 (HC), app'l (1999) EWCA Civ 3018 (CA)

*Painter* Case C-145/10

*Redwood Music vs Chappell & Co Ltd* (1982) RPC 109

*Robertson vs Lewis* (1976) RPC 169

*SAS Institute Inc. vs World Programming Ltd* Case C-406/10 (ECJ)

*Tate vs Fulbrook* (1908) 1 KB 821

*University of London Press Ltd vs University Tutorial Press Ltd* (1916) 2 Ch 601

## **Statute list**

The Copyright Act 1911

The Copyright Act 1956

Copyright, Designs and Patents Act 1988

International Covenant on Economic, Social and Cultural Rights 1966

International Covenant on Civil and Political Rights 1966

Trade Related Aspects of Intellectual Property Rights Agreement (TRIPs)

United Nations Convention on the Rights of Persons with Disabilities 2006

Universal Declaration on Human Rights 1948

UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage 2003

UNESCO Universal Declaration on Cultural Diversity 2001

### **Contributor details**

Sarah Whatley is a Professor of Dance and Director of the Centre for Dance Research (C-DaRE) at Coventry University. Her research interests include dance and new technologies, dance analysis, somatic dance practice and pedagogy, and inclusive dance practices. She is leading the AHRC-funded project 'InVisible Difference; Dance, Disability and Law' in collaboration with the co-authors.

Charlotte Waelde is a Professor of Intellectual Property Law at the University of Exeter. Her research and teaching focuses on intellectual property and Internet law and the intersection between the two.

Abbe Brown is a Senior Lecturer and Deputy Head of the Law School at the University of Aberdeen. Her research and teaching focus on intellectual property, human rights and their intersection with other legal fields.

Shawn Harmon, University of Edinburgh, specializes in medical law, health research regulation, including the impact of patenting in the pursuit of science, and the governance of emerging and converging technologies.

Contact: Sarah Whatley, Coventry University, Priory Street, Coventry, CV1 5FB, UK;  
s.whatley@coventry.ac.uk

#### Notes

---

<sup>1</sup> Article 27(1) Universal Declaration of Human Rights 1948 UNGA Resolution 217 (LXIII) ('UDHR'), Article 15(1)(a) International Covenant on Economic Social and Cultural Rights 1966 003 UNTS 3('ICESCR'); see also UNESCO Universal Declaration on Cultural Diversity 2001 and UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage 2003.

<sup>2</sup> A number of studies have examined the route into the profession for disabled dancers, focusing on training opportunities and what is needed to support disabled dancers in HE (see, e.g., Whatley 2008).

<sup>3</sup> We wish to reach beyond the established companies and highlight those who have nonetheless played a key role in building the landscape for 'inclusive' or 'integrated' professional dance practice in the United Kingdom. In that regard, we draw attention to companies such as Amici Dance Theatre Company ([amicidance.org](http://amicidance.org)), Blue Eyed Soul Dance Company

---

(blueeyedsouldance.com), Candoco Dance Company (candoco.co.uk), StopGAP Dance Company (stopgap.uk.com/html-eng/home.html), and more.

<sup>4</sup> The Arts and Humanities Research Council. 'Homepage', 2012, [ahrc.ac.uk/Pages/Home.aspx](http://ahrc.ac.uk/Pages/Home.aspx), accessed 27 January 2014.

<sup>5</sup> Beginning in January 2013, InVisible Difference (invisibledifference.org.uk) is collaboratively partnering researchers in the domains of dance and dance studies and intellectual property, human rights and biolaw. We are working with disabled dance artists to investigate the working methods and experiences of dancers, and to expose how they and others within the dance-related creative and cultural industries think about issues of authorship and ownership of their work. A key premise of the project is that issues surrounding dance and disability are made more interesting and complex when other theoretical frameworks are brought to bear.

<sup>6</sup> For more on the project, see Jo Verrent (2010).

<sup>7</sup> For the video, go to [youtube.com/watch?v=6YEtEyr6N4g](https://youtube.com/watch?v=6YEtEyr6N4g) [Accessed 3 March 2015].

<sup>8</sup> See the comment on [YouTube: youtube.com/watch?v=6YEtEyr6N4g](https://youtube.com/watch?v=6YEtEyr6N4g) [Accessed 3 March 2015].

<sup>9</sup> Ames references several Barba texts but her principal source for discussing this concept is Eugenio Barba and Nicola Savarese (1991).

<sup>10</sup> Ames is pointing to an important consideration here regarding the status of the individual performer and her comment is, presumably, to make clear that Wadsworth is participating in a community performance project as an 'amateur' as opposed to a performer who identifies himself as a professional artist, having been 'trained' and thus able to claim 'artist' status. This is not to imply that virtuosity is confined to professional artists and thereby automatically excludes others but it is precisely Ames' reference to the 'not yet' that forces us to think harder about the

---

conditions that are necessary for virtuosity, particularly when the performance challenges other conventions that surround performance practice.

<sup>11</sup> As creator of the screen version, she might more readily claim authorship of an expressive project that reframes and represents the choreographic content for the Symposium audience and subsequently the online community via YouTube.

<sup>12</sup> see note 1

<sup>13</sup> See Declaration of the Rights of Man and the Citizen (1789), John Locke (1994; work first published 1690), Jeremy Bentham (1963; work first published 1789); for ongoing arguments, see John Rawls (1972), Ronald Dworkin (1977), Michael Ignatieff (2001), Wiktor Osiatynski (2009) and Andrew Fagan (2011).

<sup>14</sup> See e.g. Janusz Symonides (2000); Yvonne Donders and Vladimir Volodin (2007); Brian Galligan and Charles Sampford (1997).

<sup>15</sup> The absence of dance and the arts in the recent (and lengthy) Scottish Human Rights Commission report is testament to this (Miller 2012).

<sup>16</sup> Regarding states who have ratified the international human rights treaties, see Office of the United Nations High Commissioner for Human Rights Status of Ratifications of the Principal Human Rights Treaties as of 14 July 2006. .

<sup>17</sup> Article 15(1)(a) ICESCR. See discussion in Rodolpho Stavenhagen's 'Cultural rights: A social science perspective' and Asbjorn Eide's 'Cultural rights as individual human rights' (in Eide et al. 2001).

<sup>18</sup> Article 15(1)(c) ICESCR, also article 17(2) UDHR.

---

<sup>19</sup> ‘Right of everyone to take part in Cultural Life’ (General Comment 21) E/C.12/GC/21 accessible via [www2.ohchr.org/english/bodies/cescr/docs/gc/E-C-12-GC-21.doc](http://www2.ohchr.org/english/bodies/cescr/docs/gc/E-C-12-GC-21.doc) [Accessed 3 March 2015].

<sup>20</sup> International Covenant on Civil and Political Rights (1966) 999 UNTS 171 (‘ICCPR’)  
Regarding states who have ratified the international human rights treaties, see Office of the United Nations High Commissioner for Human Rights ‘Status of Ratifications of the Principal Human Rights Treaties as of 14 July 2006’, available at <http://www2.ohchr.org/english/bodies/docs/status.pdf>. [Accessed 3 March 2015]

<sup>21</sup> Article 30(2) Convention on the Rights of Persons with Disabilities (2006) (‘CRPD’).

<sup>22</sup> A complaint could be made to an international human rights monitoring body, who may investigate. At best, they may ultimately say that a state has not met its obligations, and may suggest that new forms of incentive and support should be put in place for dance in general and disabled dance in particular. There is also the prospect of the possible disgust of the international community. See the Committee on Economic, Social and Cultural Rights (for ICESCR) available at <http://www2.ohchr.org/english/bodies/cescr>, [Accessed 3 March 2015] the Human Rights Committee (ICCPR\_) [unhcr.ch/html/menu2/6/hrc.htm](http://unhcr.ch/html/menu2/6/hrc.htm) [Accessed 3 March 2015], respectively, and CRPD Optional Protocol, Article 1, Committee on the Rights of Persons with Disabilities [ohchr.org/en/hrbodies/crpd/pages/crpdindex.aspx](http://ohchr.org/en/hrbodies/crpd/pages/crpdindex.aspx) [Accessed 3 March 2015]; and discussion in Gudmundur et al. (2009). For discussion on how more effective use could be made of human rights within individual disputes, see Abbe E.L. Brown (2012)

<sup>23</sup> CDPA s 11 (and unless there is an agreement to the contrary).

<sup>24</sup> CDPA s 17.

<sup>25</sup> CDPA s 21

---

<sup>26</sup> CDPA ss 18–20.

<sup>27</sup> They are *Massine vs de Basil* (1936–1945) MacG CC 223 (CA), *Holland vs Vivian Van Damm Productions Ltd* (1936–1945) MacGillvray Copyright Cases 69–77, and *Norowzian vs Arks Ltd & Ors* (1999) EMLR 67 (HC), app’l (1999) EWCA Civ 3018 (CA).

<sup>28</sup> Generally but more acutely exemplified in the United Kingdom, which is the focus of this article.

<sup>29</sup> A fact which sets the United Kingdom apart from the rest of Europe, and which means that occasionally a work may be denied protection simply because it does not fit a definition: Lucas films. However, this may have changed as a result of Case C-5/08, *Infopaq International A/S vs Danske Dagblades Forening* (2009) ECR I-6569 (ECJ).

<sup>30</sup> See ss. 1(1) and 3(1) CDPA.

<sup>31</sup> The discussion about what defines dance, and the ontology of the dance, has a long history. For example, Nijinsky said of a dancer, ‘... [Duncan’s] performance is spontaneous and is not based on any school of dancing and so cannot be taught ... It is not art.’ quoted in Deborah Jowitt (1988: 76). More recently, views about the value of ontological investigation in dance vary between perspectives rooted in the philosophy of aesthetics, such as those put forward by Graham McFee (2011), who favours a focus on dance identity rather than ontology, and those situated more in continental philosophy, such as put forward by Andre Lepecki (2006), who offers a ‘political ontology’ of dance.

<sup>32</sup> Case C-5/08, *Infopaq International A/S vs Danske Dagblades Forening* (2009) ECR I-6569 (ECJ).



---

<sup>33</sup> *Infopaq*, par. 33–38. See also *Bezpečnostní softwarová asociace*, Case C -393/09 (ECJ), para 45. What is not protected is expression which is limited by its technical function: *SAS Institute Inc. vs World Programming Ltd.*, Case C- 406/10 (ECJ) par. 38–40.

<sup>34</sup> See *Norowzian vs Arks Ltd & Ors*, Note 38. The question was whether an advertisement for Guinness in which an actor danced while a pint of Guinness was being poured was an infringement in the copyright of an earlier film called *Joy*. Because the film had been cut resulting in a series of jerky movements, the Court held that it was not a work of dance because what was shown in the advertisement was not capable of being performed.

<sup>35</sup> Van Camp cites some interesting examples: *Duet*, a dance in which Paul Taylor and his partner sit onstage in silence for three minutes; the work *Circus Polka* for 50 elephants and 50 beautiful girls for the Barnum and Bailey Circus by Balanchine. She urges ‘a *presumption* of ... such broad inclusiveness in our understanding of “choreographic work...”’ (Van Camp 1994–1995, original emphasis).

<sup>36</sup> CDPA s 1(a).

<sup>37</sup> See *University of London Press Ltd. vs University Tutorial Press Ltd.* (1916) 2 Ch 601, and *Ladbroke (Football) Ltd. vs William Hill (Football) Ltd.* (1964) 1 WLR 273.

<sup>38</sup> TRIPs Agreement Article 9.2.

<sup>39</sup> See *Infopaq*; *Bezpečnostní*; *Football Association Premier League and Others*, Joined Cases C-403/08 and C-429/08, *Painer*, Case C-145/10, *Football Dataco vs Sportrader*, Case C-173/11..

<sup>40</sup> *Bezpečnostní*, par. 48–49, *Premier League*, par. 98 and *Football Dataco*, par. 39.

<sup>41</sup> So the extent of the monopoly claimed may be known to others: *Tate vs Fulbrook* (1908) 1 KB 821.

<sup>42</sup> CDPA s 3(2).

---

<sup>43</sup> Using a dance notation system might raise a question as to whether a reproduction of the notated score in 3D form – i.e. the dance – would actually infringe copyright in the notation. The courts have held that a literary work is not infringed by making an object in accordance with the work such as making a recipe to the instructions in a cook book or a garment to a knitting pattern. *Brigid Foley vs Elliot* (1982) RPC 433. But cf *Anacon vs Environmental Research* (1994) FSR 359. Although the law does consider that turning a literary work into a dramatic work or a picture, is an infringement. CDPA s 21.

<sup>44</sup> Each of which may have separate protection in their own right.

<sup>45</sup> See for example McFee's (2011) philosophical discussion about the nature of authorship in dance.

<sup>46</sup> (1936–1945) MacG CC 223.

<sup>47</sup> Subsection 35(1) of the *Copyright Act 1911* stated that 'dramatic work' includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise, and any cinematograph production where the arrangement or acting form or the combination of incidents represented give the work an original character. Similarly, s. 45(1) of the *Copyright Act 1956* specifically referenced choreography.

<sup>48</sup> Copyright Law Reporter (New York, CCH, 1991), at no. 625. Note that there are also performers rights in dance quite separate from copyright. These rights, which would belong to the dancer, will not be further explored here.

<sup>49</sup> First recognized in *Bach vs Longman*, 98 ER [1777] 1274.

<sup>50</sup> *Austin vs Columbia* (1917–1923) MacG CC 398; *Robertson vs Lewis* (1976) RPC 169; *Redwood Music vs Chappell & Co Ltd.* (1982) RPC 109. Although the case law that has considered copyright in arrangements tends to leave the line between composition and

---

arrangement rather fuzzy *Godfrey vs Lees* (1995) EMLR 307; *Beckingham vs Hodgins* (2002) EMLR 45; *Hadley vs Kemp* (1999) EMLR 589; *Fisher vs Brooker* (2009) UKHL 41 (see also Arnold 2010).

<sup>51</sup> We are using this idea in a general sense; we acknowledge that a choreographer's relationship with her dancers is very varied and the dance may emerge through diverse methods of sourcing, generating and shaping movement material.

<sup>52</sup> Most choreographers will encourage the dancers to 'own the movement' as a way of ensuring a transfer of the intent from choreographer to performer.

<sup>53</sup> For an exposition on the way in which copyright law treats the visually impaired, see Charlotte Waelde et al. (2013).

<sup>54</sup> Note that the argument is not that a non-disabled dancer cannot be an author: it is rather that Bowditch's claim to authorship in this case is strong and made more compelling because it is Bowditch who 'composes' the double film, arguably existing as a new artefact in its own terms.

<sup>55</sup> The same arguments about the arrangement of the dance and authorship of the arrangement can equally be made for non-disabled dancers who are given the space by the choreographer to 'stamp their own intellectual touch' on the dance. In other words, the argument is not specific to the disabled dancer.

<sup>56</sup> The review appeared in *Vancouver Sun*, 20 May 1999. Scott commented with a specific reference to company member David Toole; 'There is a horrific, Satyricon quality to Candoco that heaves up in the chest – nausea at the moral rudderlessness of a world where we would pay money to watch a man whose body terminates at his ribcage, moving about the stage on his hands' (Smith 2005: 80).

---